

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 16, 2005 Session

**JANINE A. BILYEU v. CITY OF NASHVILLE, METRO LEGAL,
REPRESENTED BY JENNIFER BOZEMAN, ATTORNEY, METRO
NASHVILLE PUBLIC SCHOOLS, REPRESENTED BY DR. JULIE
WILLIAMS, ASSISTANT SUPERINTENDENT, and METROPOLITAN
NASHVILLE EDUCATORS ASSOCIATION, REPRESENTED BY HARRY
McMAKIN, Former President, 2002 and MARTHA CHILDS, ATTORNEY**

**Direct Appeal from the Chancery Court for Davidson County
No. 04-1459-III Hon. Ellen Hobbs Lyle, Chancellor**

No. M2004-02779-COA-R3-CV - Filed February 15, 2006

The Trial Court granted judgment to defendants on grounds inter alia that the plaintiff had not exhausted her administrative remedies. On appeal, we vacate the summary judgment and remand.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Vacated.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Janine A. Bilyeu, Nashville, Tennessee, *pro se*.

Karl F. Dean, Director of Law, Department of Law of the Metropolitan Government of Nashville and Davidson County, and
Laura T. Kidwell, Metropolitan Attorney, Nashville, Tennessee, for Appellees.

OPINION

Plaintiff appeals from a summary judgment granted to defendants on the basis that plaintiff had not exhausted her administrative remedies.

Plaintiff brought this action alleging breach of contract and negligent misrepresentation. She explained that she was employed by the Metro Nashville Education Association (“MNPS”) as a teacher/coach in August 2002, and had filed on-the-job injury claims as well as a sexual harassment claim. She averred that she left school on November 25, 2001 due to an emotional breakdown, and that she filed a T-OSHA claim regarding this incident citing job stress as the cause, but the claim was denied. Further, that she had a pending back injury claim, and underwent back surgery while on leave for an emotional breakdown, and that this claim was also denied as a pre-existing condition. She asserted she was released to return to work in February 2002, and that she requested a transfer due to difficulties in her work environment, but the transfer was denied.

Plaintiff asserted that Bozeman, legal counsel for the City, asked her attorney for a settlement proposal in the pending sexual harassment litigation. A meeting was held on August 16, 2002, and a verbal settlement was reached (for \$13,000.00). Another meeting was scheduled a week later to finalize the settlement, but her attorney was not present at the second meeting, and she was coerced into signing an agreement which contained no specific amount of compensation, and was advised that her MNEA counsel would be withdrawn if she did not sign it. When she later went to pick up the check, it was for \$3,455.88. When she questioned the amount, McMackin told her to deposit it but to note that it was not considered a final settlement. At yet another meeting on September 10, 2002 “to review the agreement”, she was not allowed to attend, but McMackin purported to represent her, without her consent. Plaintiff set forth specific objections to the agreement and the provisions which she felt were breached, and asked for damages for loss of personal property, medical bills, lost wages, emotional distress, and attorney’s fees and costs.

MNEA and McMackin filed a Motion to Dismiss, asserting that plaintiff’s Complaint failed to state a claim, and that the Court lacked jurisdiction to intervene in the affairs of the MNEA. This Motion was granted after plaintiff failed to respond, and the Metro Government of Nashville and Dr. Julie Williams also filed a Motion to Dismiss, asserting that plaintiff’s tort claims were barred by the GTLA, and that her remaining claims were barred because she failed to file a grievance regarding the same.

Plaintiff’s Motion seeking to set aside the Order dismissing MNEA and McMackin was denied. The Court then held a hearing and entered an Order regarding Metro’s Motion to Dismiss, and found that all claims against Dr. Williams were for actions in her official capacity and should be dismissed, and all tort claims against Metro should be dismissed due to plaintiff’s failure to comply with Tenn. Code Ann. §29-20-305(b) by failing to file suit within one year.

Regarding plaintiff’s claim for breach of contract, the Court took the claim under advisement, and ordered Bozeman, Metro legal counsel, to research the Metro records and file any and all grievance documents submitted by plaintiff since January 2003. The Court further directed Bozeman to file an affidavit regarding such documents, as well as any conversations involving the director of schools pertinent to plaintiff’s breach of settlement claim. The Court directed plaintiff to submit any grievance documents she wished the court to consider.

Bozeman filed an Affidavit that she had been a Metro attorney since September 2000, and attached documents from three grievances filed by plaintiff since January 2003. Bozeman stated that plaintiff did not claim breach of the settlement agreement in any of the grievances (although one grievance did refer to the settlement agreement to provide “context”). Plaintiff then filed certain documents which she submitted as part of her grievance regarding the settlement agreement.

The Court entered an Order on September 2, 2004, finding that the motion to dismiss had been converted to a motion for summary judgment due to the filing of documents by the parties. The court stated that the purpose of allowing the additional documents was to determine if there was any evidence that plaintiff had filed a grievance regarding her breach of settlement claim. The Court concluded, after reviewing the documents, that the claims against Metro and Dr. Williams should be dismissed, because the documents did not support plaintiff’s claim that a grievance had been filed.

Issues raised on appeal are:

1. Whether the trial court erred in considering/granting summary judgment?
2. Whether the trial court properly found that a grievance had to be filed, and it had not been filed in this case?
3. Whether the court erred in considering documentation submitted with Bozeman’s affidavit?
4. Whether the court erred in failing to consider Gold’s affidavit?¹

This Court reviews a summary judgment without any presumption of correctness of the Trial Court’s Judgment. Tenn. R. App. P. 13(d), and the Trial Court’s Judgment will be affirmed only if no material factual disputes exist and the defendant is entitled to a judgment as a matter of law. *See Blocker v. Regional Medical Center*, 722 S.W.2d 660, 660 (Tenn.1987).

The Educational Agreement negotiated by MNPS and its employees sets forth a grievance procedure, and defines a grievance as “a teacher claim that there has been violation, misinterpretation or misapplication of pertinent state and federal law or policies of the Board of Education.” As we have previously recognized:

Employees covered by a collective bargaining agreement are required, as a general rule, to pursue their contract rights using the grievance procedures established by the collective bargaining agreement. *See Vaca v. Sipes*, 386 U.S. 171, 184, 87 S. Ct. 903, 914 (1967). Accordingly, courts will not consider contract claims by employees who have not at least attempted to exhaust their contractual remedies. *Brewer v.*

¹Plaintiff had filed Gold’s affidavit which the Court held was filed after summary judgment had been granted.

Argo-Collier Truck Lines Corp., 592 S.W.2d 322, 326 (Tenn. 1979).

Byrn v. Metropolitan Bd. of Public Educ., 1991 WL 7806 (Tenn. Ct. App. 1991). We have further explained that “[t]he exhaustion defense, like the standing defense, is a judge-made doctrine whose purpose is to winnow out claims that are not ripe for adjudication. It is not intended to test the court's jurisdiction, but rather to test whether the plaintiff has stated a claim upon which relief should be granted.” *Id.*

In *Brewer v. Argo-Collier Truck Lines Corp.*, 592 S.W.2d 322, 326 (Tenn. 1979), the Supreme Court said:

Here, the contract under which plaintiffs seek to recover provides a specific grievance procedure governing the presentation of claims and clearly and automatically bars the prosecution of any claim not so presented for adjudication.

In *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), the rule is phrased thusly:

Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. 386 U.S. at 184, 87 S. Ct. at 914, 17 L. Ed. 2d 854.

In this case, the Education Agreement provides that “No grievance shall be recognized . . . unless it shall have been presented to the appropriate level in writing within forty (40) school days after the aggrieved person knew, or should have known, of the act or condition on which the grievance is based and if not so presented, the grievance shall be considered as waived.” Thus, as in *Brewer*, the Agreement provides a specific grievance procedure, and bars the claim from being pursued in any other manner.

The Court, in determining whether the exhaustion defense should apply, considers the type of claim involved, and when the claim is based upon the collective bargaining agreement itself, or if it requires reference to said agreement, the exhaustion defense will apply. *Blair v. Allied Maintenance Corp.*, 756 S.W.2d 267 (Tenn. Ct. App. 1988). It does not apply, however, to causes of action that exist independent of the labor contract. *Id.* In this case, the settlement agreement was to settle issues regarding plaintiff's leave and pay associated with her claims for on-the-job injuries. Clearly, its interpretation/enforcement would require reference to the collective bargaining agreement, which covers these issues. The Trial Court correctly held that plaintiff had to first pursue her claim through the grievance process.

Having determined that the filing of a grievance was required with regard to

plaintiff's claim, the issue thus becomes whether the Trial Court correctly found that plaintiff failed to file a grievance. The Trial Court held that "the affidavit of Jennifer Bozeman establishes without dispute that the plaintiff did not file a grievance on her claim for breach of a settlement agreement. The plaintiff's papers fail to demonstrate any facts indicating that the plaintiff followed the procedure to file a grievance on her claim of breach of settlement agreement."

As the Supreme Court has stated:

A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.03; *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). A fact is material if it "must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd*, 847 S.W.2d at 211. To determine whether a genuine issue of material fact exists, "the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Id.* at 211. If a court determines either that a dispute exists as to any material fact or that any doubt exists as to the conclusions to be drawn from the facts, the movant's motion for summary judgment must be denied. *Id.* Likewise, where the record shows that there is no genuine issue as to any material fact, judgment for the moving party "shall be rendered forthwith." Tenn. R. Civ. P. 56.04.

Luther v. Compton, 5 S.W.3d 635, 639 (Tenn. 1999).

When reviewing the grant of summary judgment, this Court must do likewise, and take the strongest legitimate view of the evidence in favor of plaintiff, and determine whether a factual issue exists, and whether defendants are entitled to judgment as a matter of law.

Bozeman's affidavit states that plaintiff filed a grievance in January 2003 which "referenced the August 23, 2002 settlement agreement at issue in the above-captioned suit only to provide context for her claim that the return to work date approved by Dr. Julie Williams had been incorrect." A review of the actual grievance documents reveals that plaintiff not only references the agreement at issue, but also claims that she did not receive earnings during the period of September 15 to October 22, 2002, even though she had a letter from her physician releasing her to return to work on September 12, and that the settlement agreement provided that she could return to work after her treating physician released her. While the plaintiff failed to use the term "breach of the settlement agreement", the substance of her claim is clear that she was complaining that she lost money because she was not allowed to return to work after being released by her doctor, which was provided for in the settlement agreement. Moreover, plaintiff received a response from Sandra Johnson denying her grievance, which also references the settlement agreement.

Plaintiff took the grievance to the next level, again discussing the provisions of the

settlement agreement that she asserts were not followed, and attaching same to her grievance. Plaintiff then received a letter from the MNEA regarding her grievance (that also discusses the terms of the settlement agreement), and which states that they will not recommend arbitration of her grievance.

Taking the strongest legitimate view of the evidence in plaintiff's favor, there is material evidence that she did attempt to file a grievance regarding what she perceived to be a breach of her settlement agreement with defendants. Her grievance references the settlement agreement and attempts to assert that it was not complied with. Under our standard of review of summary judgment, plaintiff's grievance is afforded a lenient construction. Although *pro se* litigants are not excused from compliance with the rules of pleading and procedure, they are generally accorded more leniency than trained attorneys. *Stigall v. Lyle*, 119 S.W.3d 701, 706 (Tenn. Ct. App. 2003).

Pursuant to Tenn. R. Civ. P. 56, movants are required to establish that there is no material issue of fact and that they are entitled to judgment as a matter of law. They failed to carry this burden under the rules, and the Trial Court improperly granted defendants summary judgment.

We conclude it is unnecessary to address the remaining issues and vacate the Trial Court's Judgment and remand, with the cost of the appeal assessed to defendants.

HERSCHEL PICKENS FRANKS, P.J.